Duffy Tool & Stamping, LLC *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UWA) *and* Benny Newby. Cases 25–CA–25841 and 25–CA–25871

November 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On July 14, 1999, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and cross-exceptions.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Duffy Tool & Stamping, L.L.C., Muncie, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraphs 2(b)-(d).

"(b) Within 14 days from the date of this Order, offer all employees discharged, suspended, or otherwise denied work opportunities as a result of the work rules, including the attendance policy, unilaterally implemented on January 1, 1998, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

"(c) Make whole all employees who were disciplined, or otherwise denied work opportunities, as a result of the unilateral implementation of the above rules in the manner set forth in the remedy section of the judge's decision.

"(d) Within 14 days from the date of this Order, remove from its files any reference to discipline which relies on the unlawfully implemented new work rules and attendance policy, and, within 3 days thereafter notify the affected employees in writing that this has been done and that the discipline will not be used against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, concurring.

I agree that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing its new work rules, including a new attendance policy, effective January 1, 1998. I agree that there was no overall impasse in negotiations on that date. However, there can be circumstances where an impasse on a particular subject can privilege implementation as to that subject. In *Bottom Line Enterprises*, 302 NLRB 373 (1991), and *RBE Electronics of S.D.*, 320 NLRB 80 (1995), the Board held that a union-caused delay in bargaining, or economic exigencies compelling prompt action, can excuse an employer's implementation of a particular proposal, even in the absence of an overall impasse in bargaining. I believe that the "economic exigency" part of the test is unnecessarily strict. When, as here, the parties are bargaining for a contract, and the employer wishes to make a change during the bargaining, there is clearly nothing unlawful about proposing such a change. And, if the parties reach a good-faith impasse as to that matter, I believe that the "implementation upon impasse" rule should be followed. I would require only that the employer offer a legitimate business interest for implementing upon the specific impasse (rather than waiting for a general impasse).

In the instant case, Respondent does not show the requisite business interest. Indeed, it argues that the "new" work rules are a mere codification of the old rules. On this basis, I concur in finding the violation.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] There are no exceptions to the judge's recommendation to dismiss the complaint's 8(a)(3) and (5) allegations with respect to Benny Newby.

We find merit in the General Counsel's contention in cross-exceptions that, in addition to the seven rules identified in the judge's decision, rules A.6 and B.5 were new work rules that the Respondent unilaterally implemented in violation of Sec. 8(a)(5). We find no merit, however, in the General Counsel's contention that the 8(a)(5) finding should also include the policy declaring the Respondent's right to search employee property. Prior to filing the cross-exceptions, the General Counsel did not specifically allege that the implementation of this employer investigatory policy, as opposed to rules governing employee conduct, was unlawful, and the issue was not fully litigated.

[3] We shall modify the Order to accord with *Indian Hills Care Center*, 321 NLRB 144 (1996), and with traditional Board remedial language for the injunctive and personnel record removal provisions recommended by the judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT revise, expand, unilaterally implement or enforce work rules, including an attendance policy, applicable to employees represented by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), without bargaining to impasse with the UAW over those actions.

WE WILL NOT discipline, discharge, suspend or otherwise deny work opportunities to employees represented by UAW based on the work rules and attendance policy we unilaterally implemented on January 1, 1998.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL cancel, withdraw, and rescind the work rules, including the attendance policy, we unilaterally implemented on January 1, 1998, as to employees represented by the UAW.

WE WILL remove all disciplinary warnings, including supervisor/group leader documentation forms, which rely on and/or reference in any way the work rules, including the attendance policy, we unilaterally implemented on January 1, 1998, from the personnel files of employees who are represented by UAW.

WE WILL, within 14 days from the date of the Board's order, offer all employees discharged, suspended, or otherwise denied work opportunities as a result of the work rules, including the attendance policy, we unilaterally implemented on January 1, 1998, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make whole all employees who were discharged, suspended, or otherwise denied work opportunities as a result of the work rules, including the attendance policy, we unilaterally implemented on January 1, 1998.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to discipline which relies on the unlawfully implemented new work rules and attendance policy, and, WE WILL, within 3 days thereafter, notify all affected employees in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL, on request, bargain with the Union about the revision, expansion, implementation and/or enforcement of work rules, including the attendance policy, governing the employees represented by the Union and embody in a signed agreement any understanding reached.

DUFFY TOOL & STAMPING, LLC

Joseph P. Sbuttoni, Esq. and *Joanne C. Mages, Esq*., for the General Counsel.

Jack H. Rogers, Esq., of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on January 25–27, 1999. The charge in Case 25–CA–25841 was filed on February 3, 1998, and amended on June 18, 1998. The charge in Case 25–CA–25871 was filed on February 11, 1998, and twice amended on April 7 and May 29, 1998, respectively. An order consolidating cases, consolidated complaint, and notice of hearing were issued on June 29, 1998, and the consolidated complaint was amended on January 13, 1999.

The amended consolidated complaint alleges that the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing a new attendance policy and new work rules during contract negotiations without the consent of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW or the Union) and in the absence of a legitimate impasse. It also alleges that the Respondent violated Section 8(a)(3) of the Act by unlawfully suspending and subsequently discharging Benny Newby, a union supporter and member of the union bargaining committee, because of his union activity. Finally, the amended consolidated complaint asserts that Newby's suspension and discharge violated Section 8(a)(5) of the Act because it was based on the unilaterally implemented new work rules.

The Respondent's timely answer denied the material allegations of the consolidated complaint as amended. The Respondent asserts that the parties were legitimately at impasse when the new attendance policy and new work rules were implemented. It further asserts that no violation occurred because the new work rules were a refinement of the work rules in existence prior to January 1, 1998, and because the Union waived its right to bargain on these issues during the course of collective bargaining. As for Newby's discharge, the Respondent asserts that he was in final warning status when he received an additional warning that warranted his suspension and discharge. It also asserts that Newby would have been discharged under status quo ante work rules, even if new work rules had not been unilaterally implemented.

The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the manufacture and sale of automotive parts at its facility in Muncie, Indi-

ana, where during the 12-month period preceding June 29, 1998, it sold and shipped goods valued in excess of $50,000 directly to points outside the State of Indiana. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent further admits and I find that the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Unilateral Implementation of Work Rules

1. Background

The Respondent operates two plants in Muncie, Indiana. One plant is located at 3224 Meeker Avenue (Meeker Avenue) and the other at 3401 W. 8th Street (8th Street). In 1994, the Union unsuccessfully attempted to represent the Respondent's production and maintenance employees in a bargaining unit covering both plants. Two years later, the Union initiated another organizing drive and won a Board-conducted representational election. On October 25, 1996, the Union was certified as the exclusive collective-bargaining representative in an appropriate unit consisting of:

> All production and maintenance employees employed by the Respondent at its 3224 S. Meeker Avenue, and 3401 W. 8th Street, Muncie, Indiana facilities; BUT EXCLUDING all temporary employees, all office clerical employees, all professional employees, all engineers, all draftsmen, all foremen, and all guards and supervisors as defined by the Act.

Collective bargaining for an initial contract began on January 23, 1997. After several negotiating sessions the Respondent announced that it was going to unilaterally implement a new attendance policy and new work rules on January 1, 1998.

2. The negotiating sessions leading up to unilateral implementation January 23, 1997

The Respondent's bargaining team consisted of Attorney Jack Rogers, Patti Dailey, Pat Mastery, and James Cook. The Union's bargaining team included UAW Representative Kenny Hill, and unit employees Benny Newby, Bob Reel, John Wake, and Les Ball. On January 23, the discussion focused on ground rules and places to meet for negotiations. The parties agreed to discuss noneconomic proposals first. The parties also agreed that agreement on any one provision was not final until there was agreement on all provisions.

February 26, 1997

On February 26, 1997, the parties met at a restaurant in a local hotel. The Union presented a two-page noneconomic proposal, which essentially outlined eight noneconomic provisions it sought to include in the initial contract. Among these were recognition, union-security and dues-checkoff application of the contract, seniority, representation by a bargaining committee with reasonable paid time off for grievance handling, grievance procedure, and hours of work and overtime. There also was a general provision that specifically noted that "[a]ll past and current practices including the Employee Handbook, that are not specifically discontinued or altered by this Agreement will remain in effect and become part of this Agreement." (R. Exh. 9, No. 8.)

April 4, 1997

On April 4, 1997, the Respondent presented its noneconomic proposal. It contained a "Management-Rights" clause and an "Employer Rules" provision, both of which referenced the Respondent's right to make work rules. (R. Exh. 11.) Hill credibly testified that, in essence, he told Rogers that while the Union was not opposed to having a management-rights clause in the contract, it was subject to negotiation and contingent upon the Union obtaining a union-security clause, dues-checkoff clause, and grievance procedure.[1] He also told Rogers that while the Union was not interested in writing work rules for the Respondent, it reserved the right to review the proposed work rules in the course of negotiations and grieve the application of any work rule under the proposed grievance procedure.

May 22, 1997

On May 22, the Union gave the Respondent a counterproposal, which basically integrated the core provisions of its initial two-page proposal with the provisions of the Respondent's April proposal. (R. Exh. 10.) During this negotiating session, the union committee pointed out that some of the Respondent's policies were vague and inconsistently applied. For example, the Respondent's attendance policy, which was unwritten,[2] was not being uniformly applied. Rather, each supervisor subjectively and selectively meted out discipline for attendance infractions. The Respondent told the Union that it would consider the proposals and respond at the next session.

June 11, 1997

At the June 11 bargaining session, the Respondent reviewed each of the Union's May 22 proposals. It also informed the Union that it had the opportunity to expand the pool of mutual funds available to employees for investment under the Respondent's 401(k) plan and that it intended to do so. The Union did not oppose the change.

Eventually the discussion turned to work rules and attendance. According to the Respondent's vice president, James Cook, it was the Respondent's position that it had the right to establish work rules, including attendance, and that the Union did not disagree. Cook testified that Hill told Rogers that the Union did not want to write the rules for the Respondent and did not want the rules written into the contract. By Cook's account, Hill had conceded that the Respondent had the right to unilaterally establish work rules. However, Cook also testified that Hill told the Respondent that the Union reserved the right to review and grieve the work rules under a negotiated grievance procedure.

Hill denied however that he ever said that the Respondent "makes the rules." Instead, he testified that he told Rogers that the Union did not want the responsibility for administering discipline or running the plant. He also testified that although he told Rogers that at some point there would be a management clause, as part of a total agreement, he never agreed nor waived

[1] Although Hill could not recall when he first discussed the management-rights clause with the Respondent, he credibly testified that whenever Rogers asked if the Union was interested in a management-rights clause, he would respond by asking if the Respondent was interested in a dues-checkoff and union-security clause. Because Rogers repeatedly told Hill that the Respondent was not interested in dues-checkoff or union-security clauses, an agreement on a management-rights clause was never reached.

[2] The only written reference to the term "attendance" appeared in the Respondent's handbook as a cause for discipline.

the right to negotiate over any segment of the agreement, including work rules. Thus, the thrust of Hill's testimony was that in the final analysis a union-security clause, dues-checkoff clause, and grievance procedure would be the quid pro quo for a management-rights clause and employer rules provision as part of a final contract.

While I credit, for demeanor reasons, Cook's testimony that Hill told Rogers that he did not want to write the work rules for the Respondent, I note that these comments that were not made in isolation at the bargaining table. Rather, the evidence viewed as a whole shows that Hill also told Rogers that the Union would be receptive to a work rules provision and management-rights clause in exchange for a union-security clause, dues-checkoff clause, and a grievance procedure. Indeed, a fair and complete reading of the Union's counterproposal (R. Exh. 11), reflects that it contains not only a "management-rights" and "employer rules" clause, but also a "grievance procedure" and "union-security/dues-checkoff" clauses. Moreover, the unrebutted testimony of employee Les Bell, a member of the Union's bargaining committee, also shows that the work rules provision in the Union's May 22 proposal was discussed in the context that "it would be one of the negotiable items that we would discuss." (Tr. 256.)

Thus, Cook's assertions that the Union conceded that the Respondent had the right to make the work rules is unpersuasive. Rather, I credit Hill's testimony that the Union considered the work rules to be negotiable and that it sought to obtain a union-security and dues-checkoff clause, as well as a grievance procedure, in exchange for the management-rights and work rules provisions.

July 17, 1997

When negotiations resumed on July 17, 1997, the Respondent presented the Union with a written proposal for a "no fault" point based attendance policy. Under the new attendance policy, an employee would receive two points per infraction, such as clocking in late. As the points accumulated and reached certain levels, progressive discipline would be invoked.

The Union reacted unfavorably to the Respondent's proposal. Hill testified that union negotiator, Bob Reel, opined that the policy as written would result in the termination of at least half the employees. While the Union anticipated that a uniform attendance policy would become part of the total collective-bargaining agreement, it was unwilling to accept the policy proposed by the Respondent.

After taking the Respondent's attendance proposal under advisement, the Union inquired whether the Respondent would entertain an economic proposal. Because not much progress had not been made on noneconomic issues, the Union sought to move onto economic issues. Although the Respondent agreed to review an economic proposal by the Union, it also wanted to continue discussing noneconomic issues. As Cook explained, "[W]hen we said we would accept their economic proposals . . . we had to be careful, we did not want to proceed too far down the path without discussing noneconomic because from our perspective they are all tied together." (Tr. 418.)

August 7, 1997

On August 7, 1997, Hill presented a defined benefit pension plan and asked the Respondent for job descriptions. Seniority was also discussed and Hill told the Respondent that the Union would provide more details about an apprenticeship program. According to Cook, when the subject of work rules came up, Hill stated that he did not want work rules in the contract. Cook testified that Hill stated during negotiations that "we don't want them (i.e., work rules) to be subject to negotiations, bargaining, but we sure want to look at them. We reserve the right to look at them. And we may, we won't necessarily agree with them, but we don't want them part of the contract." (Tr. 392.) For the reasons discussed earlier, I reject the implication of Cook's testimony that the Union did not want to negotiate about work rules.

September 11, 1997

At the September 11 negotiating session, the Respondent presented the Union with job classifications, rather than job descriptions. The union bargaining committee became upset because they were expecting job descriptions. Although the Respondent attributed the mix-up to a "misunderstanding," it also stated that it would have to "develop" job descriptions to coincide with a new quality assurance program that it was implementing (QS9000). The Union presented its apprenticeship program, as well as its economic proposal, which the Respondent took under advisement.

September 25, 1997

When negotiations resumed on September 25, the Respondent informed the Union that it had not yet completed its economic package, but that it was prepared to discuss noneconomic issues. Although Cook testified that the Union showed no interest in discussing noneconomic issues, Hill credibly denied that was the case. He also pointed out that by now the Union had presented both an economic and noneconomic proposal. Contrary to Cook's assertions, the evidence shows that on September 25 the parties discussed a change to the hours and shifts of the maintenance employees at the 8th Street plant proposed by the Respondent. Before the negotiating session ended, the union bargaining committee agreed to the changes, which eventually were put into effect.

October 9, 1997

On October 9, economic issues were the focus of the negotiations. The Respondent told the Union that its economic proposal was too costly. After caucusing, the Union made some changes to their economic proposal and the Respondent presented its own economic proposal.

October 23, 1997

The parties met again on October 23 to discuss the differences in their economic proposals. They also discussed the Union's proposal to establish a joint apprenticeship committee for the purpose of training employees in a 4-year journeyman program. The definition of seniority, skill, and ability were also discussed, but very little was agreed upon.

November 16, 1997

On November 16, the Respondent gave the Union a list of specific work rules (GC Exh. 7) and redistributed the new attendance policy that it presented in July. It also gave the Union some changes to its medical coverage (GC Exh. 3). Notably, the Respondent told the Union that, effective January 1, 1998, it would implement the list of work rules (many of which were new), the new attendance policy, and the medical changes. A very heated discussion took place. While the Union did not oppose the medical changes, it strenuously opposed the unilateral implementation of the new work rules and new attendance policy. Cook testified that Hill unequivocally told Rogers

"[Y]ou can't unilaterally implement these rules." (Tr. 402.) He nevertheless opined that the Respondent had already established its right to make work rules and that the Union had acknowledged that right by stating that it did not want to write the rules or make them a part of the contract.

In contrast, Hill testified that the union bargaining committee was very upset because the work rules had not been negotiated. He stated that when the union committee caucused, its members were yelling at him to file an unfair labor practice charge, but he thought it would be premature, since no changes had yet been made. Hill testified that when they returned to the bargaining table, he told Rogers that if the Respondent implemented the work rules (including the attendance policy) the Union would seek relief with the Board. Union committee member, Les Bell, also testified that the Union not only opposed the unilateral implementation of new work rules and new attendance policy, but that it told the Respondent that there was no way that they were agreeing to it, and that the work rules had to be negotiated as part of the contract. (Tr. 250.)

December 9, 1997

On December 9, Hill asked Rogers if the Respondent still intended to implement the proposed attendance policy and work rules on January 1, 1998. Rogers responded, "Yes." Cook testified that the Union refused to discuss the work rules. Hill denied that assertion. (Tr. 222.) For demeanor reasons, I credit Hill's denial.

A short time later, the Respondent gave a copy of the new attendance policy and the list of work rules to the employees and asked them to sign a paper acknowledging receipt. Some initially refused to sign, but eventually did so after the rules were implemented on January 1, 1998. Hill testified that the bargaining unit employees were very upset because they had been told that there would be no changes until after a contract had been finalized and it had been put to a vote by the employees.

3. The negotiating sessions which took place after unilateral implementation

January 15, 1998

When the negotiators returned to the bargaining table on January 15, there was a heated discussion about the unilateral implementation of the new attendance policy and new work rules. Hill advised Rogers that the Respondent's actions were unlawful and that the union was going to seek relief. In addition, some of the union bargaining committee members had received "points" under the new attendance policy because they attended a union meeting. After caucusing, the Respondent advised the union bargaining committee members that there had been a misunderstanding and that the Respondent would rescind the points, which it did. The parties then discussed economic issues, including a new economic proposal presented by the Respondent. (Tr. 408.)

March 5, 1998

At the bargaining session on March 5, the Respondent amended the new attendance policy that it unilaterally implemented on January 1. Hill testified that he told Rogers that the Respondent did not have the right to implement the policy unilaterally in the first place and that therefore it did not have the right to change the policy unilaterally. There was some discussion about the last economic offers made by both sides. The Respondent presented the Union with a survey it had conducted to support its economic proposal.

At that point, Hill pointed out to Rogers that they had been negotiating for over a year, that there were considerable problems in the plant, and that there had been no marked progress in negotiations. Hill testified that Rogers asked, "I assume you are asking for our last best offer?" According to Hill, he told Rogers, "I'm asking you to put something on the table that we can work with and that we can negotiate over."

By letter, dated April 23, 1998, the Respondent gave the Union its last best offer. Hill opted not to respond to the offer in writing, but instead chose to discuss it at the next negotiating session.

May 27, 1998

When bargaining resumed on May 27, the Union told the Respondent that its last best offer was "totally unacceptable." According to Hill, it lacked a union-security clause, a dues-checkoff clause, and a grievance procedure. Hill told Rogers that the Union could never agree to a contract that did not contain these provisions. He also told Rogers that the Union would be available to meet again whenever the Respondent modified its proposal. No other issues were discussed and there were no other meetings until January 7, 1999.

January 7, 1999

At Hill's request, another meeting was scheduled for January 7, 1999. When Hill sought to have the mayor of Indianapolis, as well as the city council, mediate the contract dispute, Cook rejected the notion out of hand. He opined that the mayor and city council were unfamiliar with the Respondent and that he was not interested in local mediation. The meeting ended and there have been no other negotiation sessions.

4. Analysis and findings

a. The unlawful conduct

Where, as here, the parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligations to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter. Rather, it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. The Board has recognized two limited exceptions to this general rule: (1) when a union engages in tactics designed to delay bargaining and (2) when economic exigencies compel prompt action. *Bottom Line Enterprises,* 302 NLRB 373 (1991). A further refinement of the second limited exception was enunciated by the Board in *RBE Electronics of S.D.,* 320 NLRB 80 (1995). However, there is no evidence, and the Respondent does not argue, that either of these limited exceptions applies in this case. Thus, the precise issue is whether there was an overall impasse on bargaining for the agreement as a whole? I find that there was no overall impasse on January 1, 1998.

Impasse is the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. *Pillowtex Corp.,* 241 NLRB 40, 46 (1979). Both parties must legitimately believe that they are at the end of their bargaining rope. *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987). None of these conditions existed on January 1, 1998.

The evidence shows that when the Respondent declared on November 16, 1997, that it was going to implement the new attendance policy and new work rules on January 1, 1998, the parties were still discussing noneconomic proposals and had

only begun discussing economic proposals. Even though negotiations on November 16 and December 9[3] were almost singularly focused on whether the Respondent had the right to unilaterally implement the new rules, the parties nevertheless continued to meet and talk well into the next year. The evidence discloses that even after the new work rules were unilaterally implemented on January 1, 1998, the parties met two more times before the Respondent presented the Union with its last best offer on April 23, 1998. The evidence shows that the parties resumed bargaining over economics on January 15 at which time the Respondent presented a new economic proposal. (Tr. 408.) At the next bargaining session held on March 5 the Respondent sought to justify its economic proposal by explaining the results of a survey that it had conducted. The session ultimately ended with the Respondent telling the Union that it would prepare its last best offer. When the parties met again on May 27 the Union rejected the Respondent's last best offer because it did not contain a union-security clause and dues-checkoff clause. Thus, the evidence shows, and I conclude, that the parties were not legitimately at impasse on or before January 1, 1998.

The Respondent alternatively argues that it had the right to unilaterally implement the new work rules because the new rules did not change existing policy. Rather, the Respondent asserts that the new work rules, including the attendance policy, merely provided a more detailed application of that policy. The argument is unconvincing. The testimony of the Respondent's director of human resources, Pat Mastery, establishes that the attendance policy implemented in January 1998 was a written point based attendance policy, and very different from the verbal policy, which it replaced. Indeed, prior to January 1, 1998, each instance of an attendance problem resulted in some form of discipline (verbal warning, written warning, etc.). Thus, the evidence establishes that the new attendance policy was not merely a refinement of an already existing policy. It was an entirely new policy and an entirely new approach to addressing attendance problems, which was not the result of negotiations with the Union.

Regarding the other new work rules that were unilaterally implemented, Mastery's testified that prior to January 1, 1998, the Respondent had 11 general work rules contained in two separate paragraphs of its handbook (GC Exhs. 6, 24). On November 16, 1997, the Respondent presented the union negotiating committee with the 20 new work rules, contained in two separate paragraphs some, but not all, of which correlated to the 11 general rules in the Respondent handbook. (GC Exh. 7.) According to Mastery's testimony, 5 of 12 rules contained in paragraph A of General Counsel Exhibit 7, were new and did not correlate to any rule in the handbook. These were:

> A. 5. Sexual racial or other types of harassment.
>
> . . . .
>
> 8. Sleeping or other gross inattention to duty during work time.
>
> 9. Misuse, disclosure, unauthorized use, removal or falsification of Respondent records, documents or confidential information or other forms of dishonesty.
>
> 10. Leaving Respondent premises during work time without permission of a supervisor.
>
> . . . .
>
> 12. Smoking or use of any tobacco products in unauthorized areas.

Two of eight rules contained in paragraph B were new and did not correlate to any rule in the handbook. These were:

> B. 3. Unauthorized distribution or posting of written or printed material.
>
> 4. Unauthorized entrance to the plant or offices. Unauthorized admittance to the plant, by employees, of [sic] family members, or other non-employees.

The remaining work rules implemented on January 1 arguably correlate to a general work rule in the handbook. The evidence therefore shows that by Mastery's own account, seven new rules had no correlation to the work rules in the Respondent's handbook. Thus, contrary to the Respondent's assertions, the new work rules are not merely a more detailed application of the work rules in existence prior to January 1, 1998. They are "new" rules which are not addressed by the Respondent's handbook.[4]

Finally, the Respondent asserts that it did not violate the Act by unilaterally implementing the new work rules because the Union waived its right to negotiate these rules. Specifically, the Respondent argues that the Union waived its right to bargain by (1) including an employer rules provision in its noneconomic proposal (R. Exh. 11, art. V) and (2) by conceding at the bargaining table that the Respondent had the right to make the work rules. The Respondent's position is unpersuasive for several reasons.

First, the underlying premise of the argument, i.e., that the Union contractually waived the right to bargain by submitting an employer rules proposal, is erroneous. In order to have a contractual waiver, there has to be a contract. In this case, there is no contract, only a contract proposal, which was part of the Union's overall noneconomic proposal that also included a grievance procedure, seniority, hours of work, and union-security and dues-checkoff clauses, all of which were rejected by the Respondent. Thus, not only is there no contract, there is no evidence of an agreement on the employer rules provision (R. Exh. 11, art. V).

In addition, even if the parties had agreed in negotiations on the language of article V, the language on its face does not establish a clear and unmistakable waiver. It states:

> ARTICLE V
>
> The Respondent shall establish, maintain, and enforce rules uniformly to insure orderly operations. It is understood that such rules shall not be inconsistent or in conflict with any provisions of this agreement. The rules agreed to not be in conflict with the provisions of this agreement will be posted and will become effective upon posting.

[3] In its Br. at 25, the Respondent points out that Hill testified at the hearing that when the Respondent stated on December 9 that it was going to put the new work rules into effect on January 1, 1998, the Union took the position that they were at impasse. (Tr. 239–240.) The use of the term "impasse" by the parties does not necessarily imply that future bargaining would be futile. *Westchester County Executive Committee,* 142 NLRB 126, 127 fn. 2 (1963). Further, the overwhelming evidence shows that the parties returned to the bargaining table in January 1998, and continued to negotiate through May 1998. Thus, the parties' conduct contradicts Hill's assertion that they were at impasse.

[4] The undisputed evidence further shows that as a result of the new rules unilaterally implemented on January 1, 1998, employees have been disciplined.

A plain reading of the proposed provision reflects that the Respondent's right to establish, maintain, and enforce the rules is based on the existence of a negotiated contract. In other words, the "right" is not independent of the other terms and conditions of the negotiated agreement, it must be implemented consistent with the other provisions of the agreement. Because there was never a finalized agreement, the provision on its face has no force or effect.

Nor does the evidence support the argument that the Union relinquished its right to bargain during negotiations. The credible testimony of both Hill and Bell shows that the union negotiating committee opposed the unilateral implementation of the new work rules on November 16 and December 9, 1997, as well as on January 15, 1998. While the Union did not want to write the work rules for the Respondent, the credible evidence shows that the Union wanted the right to review and discuss the rules prepared by the Respondent as a part of negotiations, as well as the right to grieve the application of those rules under a negotiated grievance procedure.

Finally, the Respondent asserts that the Union waived its right to bargain over the new work rules because it did not offer a counterproposal and because it refused to discuss the rules at the bargaining table. Contrary to that assertion, the evidence supports a reasonable inference that the new rules were presented as a fait accompli, which stifled any further negotiation on the subject. Hill's credible testimony, as corroborated by Bell, shows that despite the Union's opposition to the work rules, Rogers told Hill on December 9, that the Respondent was moving ahead as planned. As Hill and Bell testified, the reaction of the union bargaining committee was that the Respondent had not left them anything to negotiate concerning the new work rules.

Thus, the evidence as a whole shows that the Union did not waive its right to negotiate the new work rules and a new attendance policy. Nor were the new work rules merely a more detailed application of the existing work rules. The evidence also shows that at no time on or before January 1, 1998, were the parties legitimately at impasse. Accordingly, I find that on January 1, 1998, the Respondent unlawfully unilaterally implemented the new work rules, including the new attendance policy, in violation of Section 8(a)(5) of the Act.

b. The appropriate remedy

The undisputed evidence shows that the Respondent has disciplined and discharged employees under the new work rules and the new attendance policy that were unilaterally implemented on January 1, 1998. (Tr. 97, 111.) In her opening statement (Tr. 41) and in her posthearing brief at page 27, counsel for the General Counsel argues that as "a remedy for the violation, Respondent should be ordered to rescind the new attendance policy and work rules and any points issued to employees, [and] any discipline up to and including discharge should also be rescinded, and the affected employees should be made whole." I find that the requested relief is appropriate. In *Boland Marine & Mfg. Co.,* 225 NLRB 824, 825 (1976), the Board broadened the administrative law judge's recommended Order, under similar circumstances, to require that the "Respondent offer all employees discharged, suspended, or otherwise denied work opportunities solely as a result of the unilateral promulgation of [work] rules immediate and full reinstatement to their former positions or, if they are not available, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges, and to make whole those employees who are either discharged, suspended, or otherwise denied work opportunities solely as a result of the unilateral promulgation of [the work] rules." In other words, the Board imposed a remedy to fully restore the status quo, which existed at the time of the Respondent's unlawful actions.

Although the Respondent acknowledges in its brief at page 38 that the appropriate remedy is to restore the status quo ante, it argues that reinstatement and back pay are not proper for the former employees discharged pursuant to the new work rules and new attendance policy because they would have been discharged for cause in any event under the old work rules. There is no evidence specifically showing who was discharged and for what reason. While this remedy is not intended to disturb any discipline, including discharge, which would have been warranted under the status quo ante work rules, I find that the issue of who is entitled to reinstatement and back pay is best reserved for a compliance proceeding.

The Respondent also argues that any relief is time barred under Section 10(b) of the Act because no unfair labor practice charge was filed on behalf of these individuals. Suffice it to say that the Board's orders normally extend beyond the rights of the charging parties to encompass every employee represented by the union who is affected by an employer's unilateral policy actions, even those who have not filed individual unfair labor practice charges.

B. The Alleged Unlawful Suspension and Discharge

1. Issue

The issue is whether Benny Newby was unlawfully suspended and discharged because of his union activity in violation of Section 8(a)(3) of the Act.

2. Background

Benny Newby was a member of the union bargaining committee. He began working for the Respondent at the Meeker Street plant in June 1984. For approximately 10 years, he was employed as a maintenance mechanic and the night-security person. In April 1994, Newby was terminated by Supervisor Mike Newton for having a bad attitude. The next day, Newby spoke with James Cook, the Respondent's vice president, about getting his job back. Because Cook knew that the personal dynamics between Newby and Newton were not the best, it was arranged for Newby to work at the Respondent's 8th Street plant. Newby accepted a position in the fabrication department of the 8th Street plant at the same pay rate.

When the Union unsuccessfully sought to organize the Respondent's employees in 1994, Newby distributed authorization cards to employees at the 8th Street plant and wore a union hat to work each day. When the Union made a second attempt to organize the Respondent's employees in 1996, Newby was similarly involved in the union organizing campaign. At the Board-conducted election, which the Union won, Newby was a union observer. He subsequently was elected a member of the union negotiating committee and attended every negotiating session, except two.

During the course of negotiations, Newby received three disciplinary warnings (a verbal and two written warnings). In February 1998, he was placed in final warning status and advised that any further disciplinary or work rule violation would result "in the next disciplinary step, which is discharge." (GC Exh.

11.) Between March 30–April 4, 1998, Newby was cited for three rules violations, suspended, and discharged.

3. Newby's three disciplinary warnings which led to final warning status

On September 30, 1997, Assistant Group Leader Dave Garr told Group Leader Ted Dailey that Newby and coworker Bret Miles were talking too much during working hours and that they were not getting the job done. Dailey had previously spoken to both individuals about being productive during working hours. Both Newby and Miles received oral warnings for being unproductive. (GC Exh. 9; R. Exh. 22.)

When Human Resources Manager Patti Dailey asked Newby to sign the documentation reflecting that he had received a verbal warning, he refused and handed it back to her. According to Group Leader Ted Dailey, who was present during this conversation, Newby stated, "You know that's bullshit. I'm not going to sign it." (Tr. 356.) On the signature line, Ted Dailey wrote, "refused to sign" along with his initials. At the hearing, Newby could not remember the circumstances surrounding the warning and did not recall receiving a verbal warning. There is no evidence that Newby filed an unfair labor practice alleging that the verbal warning was motivated by union activity.

On November 13, 1997, Newby received a written warning for improper conduct. He had applied for a loan secured by his 401(k) plan, which required certain forms to be completed. When he went to the front office to pickup the paperwork, Newby objected to answering questions pertaining to his wife's salary. He became irate, gave the paperwork back to Employment Coordinator Brandi Tanselle and told her, "[t]ell whoever wants this to stick it" (Tr. 288). A nonemployee was waiting in the reception area a short distance away within view and earshot.

The following day Newby received a written warning by Human Resource Director Pat Mastery for being uncooperative, offensive, and disrespectful to Tanselle in the presence of a vendor representative. When Mastery asked Newby, "Who did you mean to stick it? Me?" Newby replied, "Whoever wants the paper work done." Newby testified that he "meant no disrespect," but refused to sign the warning. Newby further testified that after receiving the written warning, he apologized to Tanselle for his conduct. Newby did not deny the occurrence or file an unfair labor practice charge alleging that it was motivated by union activity.

On February 10, 1998, at about 11:20 a.m. or 5 minutes before quitting time, Newby went into the main office ostensibly to obtain copies of evaluation reports from Tanselle.[5] The next day, Mastery gave Newby a written warning for being out of his work area before cleanup time without prior approval. Mastery testified that Newby intimated to him that he had witnesses who could prove that he went to the main office after the 11:25 a.m. bell had rung, but never produced them. Newby was shown the written warning, but refused to sign it. Notably, the warning stated, "This is a final warning . . . another violation of this, or other, work rule will result in the next disciplinary step, which is discharge." Newby did not file an unfair labor practice charge alleging that he received the written warning because of his union activity. Thus, by March 1998, Newby was in "final warning" disciplinary status.

[5] At 11:25 a.m. each day, a bell rings in the 8th Street plant signaling a 5-minute cleanup time before lunch.

4. The incidents immediately preceding Newby's suspension and discharge

On March 30, 1998, Newby went to the breakroom for the designated 8:30–8:40 a.m. break. After getting a cup of coffee, he sat at a booth with employees Pat Kroger and Shirley Carnes. The three discussed how contract negotiations were proceeding. When the bell rang at 8:40 a.m., Newby inadvertently spilled his coffee on the table as he was getting up to leave. Carnes had to wait for Newby to clean up some of the coffee before she could leave the booth and return to work. Kroger stayed behind to help Newby wipe up the mess. They continued to talk about negotiations while they cleaned up the coffee.

In the meantime, Supervisor Chuck Davis entered the breakroom to get a cup of coffee. Newby was unaware of his presence until he heard Davis state that their break was over and it was time to get back to work. Newby testified that when he told Davis, "I'm cleaning up my mess," Davis responded, "I know what you are doing. Go back to your department." (Tr. 281.) Newby and Kroger testified that while they were cleaning up the coffee, other employees were throwing away their trash and returning from the outside smoking area.

Although Newby was not disciplined for this incident on that day, Supervisor Davis completed a "Supervisor/Group Leader Documentation Form" noting that on March 31, 1998,[6] at 8:42 a.m., Newby was in the breakroom "talking union to some other employee Shirley Carnes." Davis also noted that when he told Newby and Carnes that their break was over, Newby responded, "O.K." and the two left the breakroom.[7] (GC Exh. 12.)

At about 2:30 p.m., later that day, Assistant Production Manager Chris Davis encountered Newby in the breakroom getting a cup of coffee after the regular breaktime had ended.[8] Newby testified that Davis stated, "Aha, I got you," and that he replied, "Yeah, you do." According to Newby, he explained to Davis that he needed a cup of coffee because he had a headache. Nothing more was said. Davis testified that while he may have said, "Hello" to Newby, he denied saying anything else. He specifically denied saying, "I got you." For demeanor, and other reasons, I credit Davis' account of the breakroom encounter.

Realizing that he was in the breakroom during nonworking time without authorization, Newby immediately went to see his group leader Bill Cook to explain what happened. According to Newby, Cook passed off the incident and effectively told Newby to consider their conversation a counseling session. Newby did not receive an oral or written warning.

On April 3, 1998, while working in the fabricating department, Newby folded over two pairs of cardboard welding gloves, wrapped tape around them, and tossed the softball size object toward employee Tim Smith, who was welding approximately 25–30 feet away. As Smith reached up to deflect the object, Group Leader Lorraine Tarr walked by Smith. When Tarr looked in the direction from which the object came, she saw Newby standing and grinning. Smith batted down the ob-

[6] The evidence, including the credible testimony of Shirley Carnes, discloses that the actual date of the incident was March 30, 1998.

[7] This particular form is an internal document used by the Respondent to note certain events.

[8] The 8th Street plant workforce takes its afternoon break from 1:50–2 p.m.

ject and told Tarr, "I didn't do it." (Tr. 369.) Newby testified that Tarr stated, "Tim, throw it back, that's what you're supposed to do with it." (Tr. 328.) Tarr denied making the comment. For demeanor reasons, I credit Tarr's testimony. Tarr also credibly testified that when Smith disclaimed any involvement in the incident her only comment to him was, "I know." (Tr. 369.)

Minutes later, Newby went to see Smith's supervisor, Jeff Fillman. Newby testified that he wanted to make sure that Smith did not get reprimanded for something he did not do. (Tr. 330.) Fillman noted the visit by Newby on a Supervisor/Group Leader Documentation Form. (GC Exh. 25.) When Fillman asked Newby why he was reporting the incident to him, Newby responded, "I don't want Tim to get into trouble from this. Raine (Lorraine Tarr) saw what happened and you know she takes everything upfront." Fillman also questioned Tarr about what occurred. He reminded her that she needed to document the incident, which she did. (GC Exh. 24.) Tarr credibly testified that she would have documented the incident anyway because horseplay has to be reported. Newby, however, did not receive a disciplinary warning at the time of the incident.

Rather, on April 6, Newby was called to the human resources office. Patti Dailey, in the presence of Supervisor Mike Newton,[9] told Newby that he was being suspended pending termination because he had been seen in the breakroom getting coffee during nonbreaktime and because he had been late leaving the breakroom earlier the same day. She also mentioned the horseplay incident involving the gloves wrapped in a ball.

On April 7, 1998, 2 days after Newby was suspended, Carnes received a verbal warning (GC Exh. 21) for the coffee spill incident on March 30. Because she was 2 minutes late leaving the breakroom, Carnes was considered absent from her assigned duties in violation of an unspecified policy/procedure.

On April 9, Patti Dailey phoned Newby at home to ask him to come to the plant. The next day, when Newby arrived at Dailey's office, she told him that he was being terminated for violation of Respondent rules, but she did not elaborate.

5. Analysis and findings

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.[10] To do so, there must be evidence of protected activity, knowledge, animus or hostility, and adverse action, which tends to encourage or discourage the protected activity. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of protected activity or that the reasons for the decision are not pretextual. *T&J Trucking Co.,* 316 NLRB 771 (1995).

[9] Mike Newton was the supervisor who terminated Newby at the Meeker Street plant in 1994.

[10] *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996).

a. The General Counsel's case

There is no dispute that Newby was an active union member, who was known as such to the Respondent. He solicited authorization cards, was an election observer for the Union, and a member of the union bargaining committee. Two documents (G.C. Exhs. 12 & 13) unequivocally reflect that the Respondent was aware of Newby's prounion support.

The evidence also supports a reasonable inference of antiunion animus. Newby's suspension and discharge was prompted, in part, by the March 30th coffee spill incident. However, the undisputed evidence shows that Newby, Kroger, and Carnes were not alone while they wiped up the coffee. Other employees were still milling about the breakroom, but nothing was said to them. Only the trio, who was talking about the Union as they cleaned, was told to "quit talking about the things you're talking about" and to get back to work. (Tr. 53.) Even though they promptly complied, Supervisor Chuck Davis made a written notation that Newby was "talking union to some other employee" in the breakroom 2 minutes after break was over. (GC Exh. 12.) Thus, the evidence supports a reasonable inference that the trio was singled out for "talking union."

In addition, none of the other employees who lingered in the breakroom after the bell had rung was subsequently written up or disciplined for not immediately returning to work. Nor is there evidence that any employee, prior to March 30, was ever disciplined for leaving the breakroom a few minutes late. Rather, the evidence shows that on January 26, 1998, employee Joe Kirkpatrick returned to his work area 5 minutes after the bell had rung. Unlike Newby, Kirkpatrick was not disciplined, even though he could not explain why he was late. Although Kirkpatrick was counseled, warned, and eventually discharged at the end of March 1998, his failure to immediately return to work on January 26 was never mentioned in connection with any subsequent discipline, including discharge. (G.C. Exh. 17.) Thus, the evidence supports a reasonable inference that by disciplining Newby for leaving the breakroom 2 minutes late, the Respondent treated him differently than other employees because of his union activity.

Finally, the evidence shows that the only other employee to be disciplined for leaving the breakroom late was Shirley Carnes, the person who helped Newby cleanup the coffee spill. On April 7, she received a verbal warning for being absent from assigned duties on March 30. That was 7 days after the fact and more notably 1 day after Newby was suspended. The timing of the delayed warning is suspect.

In addition, Carnes testified that when she received the warning she told Patti Dailey that there were rumors circulating that Newby was suspended for talking about the Union in the breakroom. Carnes told Dailey that she did not ask Newby about the Union while they wiped up the coffee. The implication is that Carnes had the impression that she was receiving a warning for that reason. Instead of disavowing that notion, Dailey cultivated it by telling Carnes to write on the warning that she "didn't ask him about the Union." Dailey's remarks are further evidence that the discipline was based on union activity.

Thus, the circumstances viewed as a whole warrant an inference that the Respondent's reasons for suspending and discharging Newby at least in part were unlawfully motivated. I therefore find that the General Counsel has submitted enough evidence to sustain his initial evidentiary burden. The Respondent must demonstrate that it would have suspended and discharge Newby, even in the absence of his union activity.

b. The countervailing evidence

The countervailing evidence shows that Newby was in final warning status on March 30, 1998. He had received a verbal and two written warnings between September 1997 and March 1998. The second written warning issued on February 23, 1998, stated, "[t]his is a final warning . . . another violation of this, or other, work rule will result in the next disciplinary step, which is discharge." (GC Exh. 11.) The evidence also shows that this discipline was administered in a manner consistent with Respondent's disciplinary policy as stated in its handbook. (GC Exh. 6, p. 23.)

The countervailing evidence also shows that Newby's conduct on March 30 and April 3 was improper. Newby admitted as much at the hearing. He testified that after Supervisor Davis found him in the breakroom getting coffee without permission during working hours, he immediately reported himself to his group leader. He further testified that after throwing the cardboard gloves wrapped in tape at employee Smith, he went to see Smith's supervisor to accept responsibility for the horseplay so that Smith would not be disciplined.

Newby's conduct, that is, being absent from assigned duties while at work and engaging in horseplay, also violated the status quo ante work rules in effect prior to January 1, 1998. (Tr. 24; GC Exhs. 6 & 7.) The evidence further shows that other employees had been disciplined prior to January 1 for being out of their work areas without permission (Steve Howard, Tom Priddy, Mike Chapman, and Andy Racer) (R. Exh. 22) and for engaging in horseplay (Steve Howard) (R. Exh. 19). Thus, with respect to getting coffee in the breakroom during nonbreaktime and horseplay, the evidence shows that Newby was treated the same as other employees who violated the status quo ante work rules.

Counsel for the General Counsel nevertheless argues that these infractions are relatively minor and do not warrant suspension and discharge. Relying on the personnel records of former employees William Farber, Steve Howard, and Joe Kirkpatrick, he points out that each of these individuals committed similar infractions, but was not discharged because of it. The position is untenable. The evidence shows that all of these individuals received some form of discipline ranging from counseling to written warning for being out of their work area without authorization or horseplay, but none was discharged because none of them was in final warning status at the time. Further, the evidence shows that eventually Kirkpatrick and Howard were discharged, even though they were never placed in final warning status. Moreover, Farber, who eventually was placed in final warning status, was discharged for the very next infraction. (GC Exh. 17–20.)

On balance, I find from the total circumstances proved that the Respondent would have suspended and discharged Newby because of these other two infractions, notwithstanding the coffee spill incident, and notwithstanding his union activity. I therefore find that the Respondent has sustained its burden in this matter.

Accordingly, I shall recommend that the allegations of paragraphs 5 and 8 of the amended consolidated complaint be dismissed.

C. The Alleged Relationship Between the New Work Rule and *Newby's Suspension and Discharge*

Paragraph 7(d) of the amended consolidated complaint alleges that Newby's suspension and discharge resulted from the Respondent's enforcement of the new work rules that were unlawfully implemented on January 1, 1998. The evidence does not support this allegation. Rather, as noted above, absence from assigned duties while at work and engaging in horseplay also violated the work rules in effect prior to January 1, 1998. (Tr. 24; GC Exhs. 6 & 7.) The evidence also shows that prior to January 1 other employees also had been disciplined for being out of their work areas without permission (Steve Howard, Tom Priddy, Mike Chapman, and Andy Racer) (R. Exh. 22) and for engaging in horseplay (Steve Howard) (R. Exh.19).

Accordingly, I shall recommend that paragraphs 7(d) and 9, as the latter relates to paragraphs 5 and 7(d) of the amended consolidated complaint, be dismissed.

CONCLUSIONS OF LAW

1. By unilaterally implementing new work rules and a new attendance policy in the absence of a legitimate impasse in negotiations, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By disciplining employees, including discharge, pursuant to the unilaterally implemented new work rules and new attendance policy, the Respondent violated Section 8(a)(1) and (5) of the Act.

3. The Respondent did not engage in any other unfair labor practice alleged in the amended consolidated complaint in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall cancel, withdraw, and rescind the new work rules, including the new attendance policy, unilaterally implemented on January 1, 1998, as to the employees represented by the Union. The Respondent shall remove from the personnel files of all bargaining unit employees all disciplinary warnings and/or supervisor/group leader documentation forms issued, since January 1, 1998, for violating the unilaterally implemented new work rules, including the new attendance policy, and shall offer all bargaining unit employees discharged, suspended, or otherwise denied work opportunities as a result of the unilateral promulgation of those work rules and/or attendance policy, immediate and full reinstatement to their former positions or, if they are not available, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges. *Boland Marine & Mfg. Co.,* 225 NLRB 824 (1976), enfd. 562 F.2d 1259 (5th Cir. 1977). It should be pointed out again that this remedy is not intended to disturb any discipline, including discharge, which would have resulted under the status quo ante work rules or attendance policy. The Respondent shall make whole all employees who were discharged, suspended, or otherwise denied work opportunities as a result of the unilateral implementation of the work rules and attendance policy for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge, suspension, or otherwise denied work opportunity, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed as *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Duffy Tool & Stamping, L.L.C., Muncie, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Revising, expanding, implementing, and thereafter enforcing work rules, including attendance policy, governing employees represented by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (the Union), without bargaining with the Union to a legitimate impasse.

(b) Disciplining, including discharging, any employees represented by the Union, pursuant to the work rules and attendance policy unilaterally implemented on January 1, 1998.

(c) In any like or related manner interfering with the efforts of the Union to bargain collectively on behalf of the employees it represents.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Cancel, withdraw, and rescind the work rules, including the attendance policy, unilaterally implemented on January 1, 1998, as to employees represented by the Union.

(b) Remove all disciplinary warnings, including supervisor/group leader documentation forms, which rely on and/or reference in any way the work rules, including the attendance policy, unilaterally implemented on January 1, 1998, from the personnel files of employees who are represented by the Union for purposes of collective bargaining.

(c) Offer all employees discharged, suspended, or otherwise denied work opportunities as a result of the work rules, including the attendance policy, unilaterally implemented on January 1, 1998, immediate and full reinstatement to their former positions or, if they are not available, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges.

(d) Make whole all employees who were discharged, suspended, or otherwise denied work opportunities as a result of the unilateral implementation of the above rules in the manner set forth in the remedy section of this decision.

(e) Upon request, bargain with the Union about the revision, expansion, implementation, and/or enforcement of work rules, including the attendance policy, governing the employees represented by the Union and embody in a signed agreement any understanding reached.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records, including electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Meeker Avenue and 8th Street plants in Muncie, Indiana, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 1998.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the amended consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."